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No. 410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

TRAILWAYS OF NEW ENGLAND, INC., *Petitioner,*

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO, DIVISION 1318

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Trailways of New England, Inc., by its counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on April 13, 1965.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 1a-7a) is reported at 343 F. 2d 815. The opinion of the United States District Court for Massachusetts (R. 55-59)[1] is reported at 232 F. Supp. 608.

JURISDICTION

The judgment of the court below was entered on April 13, 1965 (Appendix B, *infra*, p. 8a). On June 29, 1965, Mr. Justice Goldberg extended the time for filing a petition for a writ of certiorari herein to and including August 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in view of the employee loss of status provisions of Section 8(d) of the National Labor Relations Act, an employer is required, pursuant to a collective bargaining agreement, to arbitrate the discharges of employees who engaged in an unprotected strike during the sixty-day period proscribed by Section 8(d)?

2. Whether an employer is required to arbitrate discharges resulting from a strike where there has been a repudiation by the union and employees of a grievance and arbitration clause, and a fundamental change has occurred in the relationship of the parties prior to the demand for arbitration, as distinguished from *Drake Bakeries, Inc.* v. *Bakery Workers*, 370 U.S. 254 (1962), and *Packinghouse Workers* v. *Needham*, 376 U.S. 247 (1964)?

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[1] "R." references are to the Petitioner's appendix filed in the court of appeals.

STATUTES INVOLVED

Section 8(d) of the National Labor Relations Act, as amended (61 Stat. 140, 29 U.S.C. 158 (d)), provides as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and concili-

ate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) of this Act, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Section 301(a) of the Labor Management Relations Act, as amended (81 Stat. 156, 29 U.S.C. 185 (a)), provides as follows:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor or-

ganizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

1. Background to the Proceeding

The Petitioner (Company) is engaged in the interstate transportation of passengers by motor bus between various points in Massachusetts, New York, Connecticut, New Hampshire and Maine. A collective bargaining agreement existed between the Company and the Union effective by its terms from April 23, 1961 to February 4, 1964. Article XXI of the agreement provided that—

> Section 7. All grievances arising hereunder, including discharge, disciplinary action over the interpretation and application of the Agreement shall be disposed of in the following manner: . . .

Grievance procedures were set forth in subsection a, b and c, and subsection d provided for arbitration in the event of failure to resolve the dispute under grievance procedures. Arbitration of Company grievances was provided for in Section 8 (R. 14-16).

On November 21, 1963, the Union notified the Company that it desired to make certain changes in the collective bargaining agreement which was to expire on February 4, 1964, and to resolve all grievances. The Company responded on November 27, 1964, advising the Union of its desire to cancel the agreement in its entirety and of its hope to prepare a new agreement. By letter dated December 10, 1963, the Union advised the Company of a "controversy" regarding the carry-

ing of "standees" on Company buses. This matter was put aside to be discussed at a meeting in January 1964 which had been set to resolve all outstanding grievances and to allow the Union to present its proposed changes to the agreement (*infra*, pp. 3a, 4a).[2]

On December 29, 1963, an employee-driver of the Company refused to obey a Company order to carry "standees". For this refusal, he was removed from service and, on December 31, 1963, was given a 30-day suspension for insubordination. Despite the agreement to negotiate a new contract and to resolve all disputes and grievances, all other drivers represented by the Union refused to pull their runs (*infra*, p. 2a).

A strike took place in spite of repeated warnings by the Company that it considered the strike illegal and that all participating employees were subject to discharge. The Company had demanded that the Union follow the grievance procedures outlined in the collective bargaining agreement with regard to the suspension of the driver, and had itself made five separate offers to submit this suspension to the grievance procedures (R. 25, 27, 29, 30, 32, 37). When the Union and employees refused to follow the grievance procedures required under the agreement, the Company discharged approximately 190 drivers and terminal employees for participating in the strike. These discharges were later confirmed by letters dated January 6 and January 8, 1964, and on January 14 the Company notified the Union that it was terminating and rescinding the collective-bargaining agreement as of December 31, 1963 because of the strike (*infra*, pp. 2a, 3a, R. 23).

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[2] The court below noted that these circumstances brought into issue the provisions of Section 8(d). (*infra*, p. 3a).

On January 14, 1964, the Union filed a grievance on behalf of the employees discharged. The Company refused to process these grievances because of the impropriety of the strike (*infra*, p. 3a).

2. The Decision of the District Court

The Union brought this action pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185 (*supra*, pp. 4-5) to compel arbitration under the collective bargaining agreement. The Company filed a motion to dismiss, and the Union moved for summary judgment (R. 55, 56). The district court allowed the Union's motion for summary judgment, denied the Company's motion to dismiss, and ordered the Company to submit to arbitration the grievance filed on behalf of the discharged employees[3] (R. 56, 59, 60).

Though recognizing that Section 8(d) of the National Labor Relations Act (29 U.S.C. 158(d)) prohibits a strike or lockout by a party which has given the required sixty-day notice of its intention to seek modification of an existing collective bargaining agreement during the sixty-day period—and noting further that the "Union had, in this case, given the 60-day notice about 41 days before the strike" (R. 58, fn.)—the court did not reach the "loss of status" issue. The district court found that the jurisdiction of the National Labor Relations Board to deal with "an unfair labor practice" which violates a collective bargain is

[3] The district court also ordered arbitration of the grievance of the driver whom the Company had suspended for insubordination, which is not at issue here. It should be noted that the Company raised arguments before the district court and the court of appeals which are not pursued herein.

not exclusive, and that jurisdiction also lies in the court in suits under Section 301[4] (R. 59).

Relying on the decisions in *Drake Bakeries, Inc.* v. *Bakery Workers,* 370 U.S. 254 (1962), and *Packinghouse Workers* v. *Needham,* 376 U.S. 247 (1964), the court held that the Company was required to arbitrate the discharges arising out of the strike (R. 59).

3. The Decision of the Court of Appeals

The court of appeals was unanimous in affirming the judgment of the district court. In so holding, the court reframed the Section 8(d) issue, as follows: "Does a strike arguably in violation of Section 8(d) of the National Labor Relations Act relieve the employer of his duty to arbitrate discharges resulting from the strike?" The court stated that the question was one of arbitrability "since we have some doubt—though we need not decide—whether the discharges occasioned by a violation of section 8(d) and, therefore, cloaked in the protection afforded by that section must be arbitrated." The court noted that the issue had not been raised before. Equating "loss of status" provisions affecting employees with "unfair labor practices" by a union, and relying on this Court's preference for compelling parties to go to arbitration (*Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U.S. 574 (1960)), the court below held that "an employer must arbitrate grievances arising from the discharge of strikers even where the strike may have been an unfair labor practice in violation of section 8(d)." The court below declined to decide whether its decision would be the

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[4] In a footnote (R. 59), the court stated that it was "not at all clear that the strike did constitute an unfair labor practice", citing *Local Union No. 9735* v. *N.L.R.B.,* 258 F.2d 146 (C.A.D.C. 1958).

same "where a strike was admittedly or clearly a violation of 8(d)." (*infra*, pp. 5a-7a).

In a concurring opinion, Chief Judge Aldrich stated "that we are not presently deciding whether, if the strike was an unfair labor practice, it would be contrary to the provisions of the Act to foreclose by contract an employer's right to take the action contemplated by section 8(d)(4)." (*infra*, p. 7a).

The court of appeals also rejected the Company's argument that the strike in violation of an implied no-strike clause in the agreement enabled it to terminate the contract, citing *Packinghouse Workers* v. *Needham, supra,* and also *Drake Bakeries* v. *Bakery Workers, supra.* Noting that in *Needham* there was an express no-strike clause and that here, as in *Needham,* the Company contended that it considered the collective bargaining agreement "repudiated and terminated", the court below held that the Company was not relieved of its duty to arbitrate by reason of the Union's failure to comply with the grievance and arbitration provisions since "no exception was made in the arbitration provision for the arbitrability of discharges arising out of strikers." (*infra* p. 5a).

REASONS FOR GRANTING THE WRIT

1. The interpretation of the "loss of status" provision in Section 8(d) is an important issue of federal law which has not been, but should be, settled by this Court. Though it failed to meet this issue directly, the court below correctly stated that "[I]t has not been raised before." (*infra,* p. 6a).

The court below concluded that an employer *must* submit to arbitration discharges arising out of a strike which was within the sixty-day period proscribed by

Section 8(d) where the strike "may have been an unfair labor practice . . .," but declined to state what its ruling would be where "a strike was admittedly or clearly a violation of 8(d)." (*infra*, p. 7a). The statute, however, does not limit the effect of the "loss of status" provision to strikes which are unfair labor practices, but states that "(A)ny employee who engages in a strike within the sixty-day period . . . shall lose his status. . . ." Though this Court has stated that Section 8(d) "is susceptible of various interpretations" (*National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957)), such interpretations must conform to the dual purpose of the statute—to protect the right of employees to engage in concerted activities and to substitute collective bargaining for economic warfare so as to avoid interrupting the flow of commerce. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270 (1956).

The strike herein was unprotected, in that it was not a protected concerted activity, such as a strike to protest an unfair labor practice by an employer. *Mastro Plastics Corp.* v. *National Labor Relations Board, supra.* Thus, the strikers resorted to economic warfare against the Company without regard to the grievances and arbitration provisions in the existing contract (R. 14-16) or the prohibition in Section 8(d).

The statutory reference to "the duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4)" of Section 8(d) reflects a Congressional purpose to place certain responsibilities upon each. An employer is required to abstain from a lockout during the sixty-day period, and to maintain the conditions of the existing contract. The labor organization is similarly under a duty to observe the conditions of the existing contract during the sixty-

day period, without resorting to a strike. The employees are required to refrain from striking during this same period, and a breach on their part will entail a loss of their employee status. To so interpret this section as to limit the "loss of status" provisions to those cases where the strike itself was an unfair labor practice by the union would deprive the provision of any specific effect or significance. Where a strike by a union is prohibited by Section 8(d), and is therefore an unfair labor practice, the participants in it become subject to a lawful power of discharge in the employer without resort to the "loss of status" provision. *United Furniture Workers of America* v. *National Labor Relations Board,* 336 F.2d 738 (D.C.Cir. 1964), *cert. den'd.* 85 S.Ct. 73; *United Electrical Workers* v. *National Labor Relations Board,* 223 F.2d 338 (D.C. Cir. 1955), *cert. den'd.* 350 U.S. 981 (1956).

Clearly, the Congress sought a cooling off period during which *all* of the parties would be restrained in their actions so as to permit orderly collective bargaining, and the "loss of status" provision was intended to inhibit the employees from engaging in wildcat strikes or work stoppages which were not necessarily promulgated by the labor organization. Similarly, an unprotected strike, during the proscribed sixty-day period, which was not ostensibly an attempt to modify the existing agreement—whether or not promulgated by the labor organization—would necessarily bring into play the "loss of status" provision against the strikers or the cooling off period desired by the Congress could be evaded, i.e. the employees could bring economic pressure to bear on an employer in seeking to modify an existing contract by declaring their strike to be for another purpose. *Cf. Local Union No. 9735* v. *National Labor Relations Board,* 258 F.2d 146 (D.C. Cir. 1958).

Basic statutory construction requires that significance and effect be accorded to every word, for as early as in Bacon's Abridgement section 2, it was stated that "A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant." *Washington Market Co.* v. *Hoffman,* 101 U.S. 113, 116 (1879). The "loss of status" provision would be superfluous were it to be tied to a situation where the strike by the Union was a violation of Section 8(d), yet the court of appeals has so interpreted this section.

Moreover, the interpretation of this section by the court below would appear to be in conflict with decisions by other courts of appeals. In *Local No. 3* v. *National Labor Relations Board,* 210 F.2d 325, 333 (8th Cir. 1954), *cert. den'd.* 348 U.S. 822 (1955), the court, in referring to Section 8(d), stated:

> We are of the view that by going out on strike before the expiration date of the collective bargaining contract the employees lost their status as employees of the company and hence they were not entitled to re-employment as a matter of right.

And, in *United Electrical Workers* v. *National Labor Relations Board,* 223 F.2d 338, 342 (D.C. Cir. 1955), *cert. den'd.* 350 U.S. 981 (1956), the court stated:

> . . . Moreover Section 8(d) of the Act specifically provides that "any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee". This strike was within the sixty-day period, and so the participants immediately thereupon lost their status as employees.

The clear language of the statute supports the interpretation adopted by these courts. The fact that the

employees engaged in an unprotected strike 41 days after the Union gave the Company the sixty-day notice required by Section 8(d) deprived them of their status as employees (*infra*, p. 3a, R. 58, fn.). *Fort Smith Chair Company*, 143 N.L.R.B. 514 (1963).[5] The court of appeals, citing *San Diego Unions* v. *Garmon*, 359 U.S. 236 (1959), declined to decide whether the strike by the Union was an unfair labor practice in violation of Section 8(d),[6] but the absence of such a determination cannot be relied upon as a means to evade a determination herein as to the affect of the "loss of status" provision on employees participating in the strike during the proscribed period.

The fact that this Court "has made clear its preference for compelling parties to go to arbitration when they have agreed to do so" (*infra*, p. 6a) does not diminish the effect of Section 8(d), for ". . . [A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). There is assuredly no language in the collective bargaining agreement which would indicate any intention by the Company to waive such rights or

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[5] On appeal, the court did not find it necessary to pass on this point in affirming the decision of the Board. *United Furniture Workers of America* v. *National Labor Relations Board*, 336 F.2d at 740, fn. 3.

[6] The Union provided the sixty-day notice and offered to meet for negotiations, but there is no record of a notification to the Federal Mediation and Conciliation Service, or the corresponding Massachusetts agency, as required by Section 8(d)(3). *See, United Furniture Workers of America* v. *National Labor Relations Board, supra*, and *Local Union 219* v. *National Labor Relations Board*, 265 F.2d 814 (D.C. Cir. 1959), where the court specifically reserved the issue of "loss of status". 265 F.2d at 819, fn. 3.

authority as it might accrue by action of Section 8(d). It is clear that the public interest would not be served if the parties to a labor agreement could by contract effect a waiver of Section 8(d), wherein the Congress sought to establish a cooling off period so as to maintain labor peace.[7] Suffice it to say that the court below failed to give effect to the "loss of status" provision of Section 8(d) by requiring the Company to arbitrate the discharges arising from the strike within the proscribed period. This decision now constitutes a precedent which endangers national labor relations and continued labor peace by its restrictive interpretation of Section 8(d), contrary to the Congressional intent and purpose.

2. In requiring the Company to arbitrate the discharges of employees who had repudiated the grievance and arbitration provisions of the collective bargaining agreement, and thereafter engaged in a strike in violation of an implied no-strike clause in the agreement, the court below has departed from this Court's decisions in *Drake Bakeries* v. *Bakery Workers, supra,* and *Packinghouse Workers* v. *Needham, supra.* The decision below is in conflict with the qualifying language set forth by this Court in *Drake Bakeries* and *Needham,* and, if allowed to stand, would place in jeopardy the future employment of arbitration clauses in collective bargaining agreements.

Drake Bakeries involved an action for damages by an employer against a union pursuant to Section 301

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[7] Concurring opinion of Chief Judge Aldrich, *infra* p. 7a. *See, Lodge 743, Int. Ass'n of Mach.* v. *United Aircraft Corp.,* 337 F.2d 5 (2nd Cir. 1964), *cert. den'd.* 380 U.S. 908; *International U. of E.R. & M. Wkrs., Local 613* v. *N.L.R.B.,* 328 F.2d 723 (3rd Cir. 1964); *J. I. Case* v. *N.L.R.B.,* 321 U.S. 332 (1944).

of the Labor Management Relations Act. The employer, which had not sought or attempted to terminate or rescind the existing collective bargaining agreement, which included a no-strike clause, alleged that the union had engaged in a one-day strike which was a major breach of the agreement relieving the employer from a need to arbitrate its damage claim—as was otherwise required by the agreement. The union claimed that it did not strike, and that the employer was required to submit its complaint to arbitration pursuant to the terms of the agreement.

Noting that the question of a strike was in dispute and that only four months previously the employer had submitted to arbitration a claim for damages arising out of an earlier alleged strike, this Court affirmed the decisions of the lower courts in finding that the employer's claim for damages was properly the subject of arbitration, since an alleged strike in violation of a no-strike clause in a contract is not automatically and regardless of the circumstances such a breach or repudiation of the arbitration clause as to excuse the employer from arbitrating. In so holding, this Court stated:

> . . . Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach; and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important. 370 U.S. at 262.

The facts in *Drake Bakeries* did not demonstrate such a breach or repudiation.

In *Needham*, a union had brought an action pursuant to Section 301 to compel an employer to arbi-

trate discharges arising out of an alleged strike in violation of a no-strike clause in a collective bargaining agreement. The employer claimed that the no-strike clause was so basic to the collective bargain that its breach by the union was so completely inconsistent with the arbitration clause as to excuse the employer's duty to arbitrate. This Court, citing its opinion in *Drake Bakeries*,[8] held that the employer was required to arbitrate the discharges, and noted that the duty to arbitrate was clearer in this case than in *Drake Bakeries* because the "claim of wrongful discharge is one which Needham agreed to arbitrate." 376 U.S. at 252.

In *Needham*, as in *Drake Bakeries*, this Court did not state that an arbitration clause would survive a strike in breach of a contract under all circumstances and in every situation.

> . . . Whether a fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration would be a circumstance which, alone or among others, would release an employer from his promise to arbitrate we need not decide, since the undeveloped record before us reveals no such circumstance. 376 U.S. at 253.

In the instant proceeding, the undisputed facts of record are that the Company made five separate offers to submit the suspension of the driver (Paine) to the grievance procedures under the collective bargaining agreement (R. 25, 27, 29, 30, 32, 37). The Company notified its employees that the Union was refusing to comply with the grievance and arbitration section of the agreement, and that the strike was illegal and unauthorized, by distributing mimeographed notices, by

[8] And quoting the section set forth above.

telephone and telegraph, by press and radio releases and by direct face-to-face exchanges (R. 25, 27, 29, 30, 32-33, 37, 57). The Union repudiated the grievance and arbitration procedures by embarking upon and continuing the unauthorized strike. The courts below failed to take this into consideration, though the Union did not rebut or refute the fact that such offers were made by the Company, prior to the strike, to submit the matter of the suspended driver—which the courts found to be the basis of the strike action (*infra*, p. 2a, R. 57)—to the grievance and arbitration procedures required by the collective bargaining agreement.[9]

The Union having repudiated its promise to submit its dispute to the grievance and arbitration procedures set forth in the contract, the case is clearly distinguishable from and within the exception outlined in *Drake Bakeries*. 370 U.S. at 262. Moreover, the record here demonstrates "a fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration," as premised in *Needham*. 370 U.S. at 253. The strike occurred within the sixty-day period proscribed by Section 8(d), and the participating employees lost their status as employees of the Company (*supra*, pp. 9-14).

The court below has erroneously interpreted *Drake Bakeries* and *Needham* as demanding arbitration of

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[9] The court of appeals stated that the contract here lacked the no-strike clause contained in *Needham* (*infra*, p. 5a), though the record demonstrates that the grievance and arbitration provisions in the contract were intended to prevent strikes by providing a peaceful means of settling disputes (R. 44, 45-46, 47, 49), and thus constituted an implied no-strike clause. *Local 174, Teamsters* v. *Lucas Flour*, 369 U.S. 95 (1962); *International Brotherhood* v. *W. L. Mead, Inc.*, 230 F.2d 576 (1st Cir. 1956), *app.* dism'd, 352 U.S. 802 (1956).

discharges arising out of a strike in violation of an actual or implied no-strike clause, contrary to the clear language of these decisions.

> . . . We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged . . . 370 U.S. at 265.

In no other case known to the Petitioner has a court of appeals given a like interpretation to this Court's decisions in *Drake Bakeries* and *Needham*.[10] If the court below is correct in its interpretation and application of these decisions, parties to collective bargaining agreements may well come to shun arbitration clauses, in that they may be ignored and repudiated by one party without sacrificing thereby its rights thereafter to resort to arbitration. This would be detrimental to this Court's purposes in giving preference to enforcement of arbitration clauses as a means of insuring labor peace.

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[10] *Kennecott Copper Corp.* v. *International Bro. of Elec. Workers*, 339 F.2d 343, 345 (10th Cir. 1964); *Brotherhood of L. F. & E.* v. *Kennecott Copper Corp.*, 338 F.2d 224, 226 (10th Cir. 1964); *Minnesota Joint Bd.* v. *United Garment Mfg. Co.*, 338 F.2d 195, 199 (8th Cir. 1964); *United Steelworkers* v. *American International Aluminum Corp.*, 334 F.2d 147, 150 (5th Cir. 1964), *cert. den'd.* 379 U.S. 991; *International U. of Elec. R. & M. Wkrs.* v. *General Elec. Co.*, 332 F.2d 485, 492 (2nd Cir. 1964), *cert. den'd.* 379 U.S. 928; *Bonnot* v. *Congress of Independent Unions Local #14*, 331 F.2d 335, 358 (8th Cir. 1964); *E. T. Simonds* v. *Int'l. Hod Carriers*, 315 F.2d 291, 293 (7th Cir. 1963); *United Textile Workers* v. *Newberry Mills, Inc.*, 315 F.2d 217, 219 (4th Cir. 1963), *cert. den'd.* 375 U.S. 818.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6342.

TRAILWAYS OF NEW ENGLAND, INC., *Appellant,*

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO, DIVISION 1318, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges.*

Betty J. Southard, with whom *Edward I. Masterman, Paul J. Redmond, Richard R. Paradise, Masterman & Redmond* and *Roberts & McInnis* were on brief, for appellant.

Earle W. Putnam, with whom *Bernard Cushman, Arthur J. Flamm,* and *Segal and Flamm* were on brief for appellee.

Opinion of the Court

April 13, 1965.

HARTIGAN, *Senior Circuit Judge* (by designation). This is an appeal from a summary judgment of the United States District Court for the District of Massachusetts entered

May 13, 1964, ordering the appellant company to arbitrate certain grievances relating to the suspension of one of its drivers and to the discharge of other employees.

The company is engaged in the interstate transportation of passengers by motor bus between various points in Maine, New Hampshire, Massachusetts, Connecticut and New York. A collective bargaining agreement existed between it and the union effective from April 23, 1961 to February 4, 1964. By Article XXI it provided for the settling of grievances as follows:

> "Section 7. All grievances arising hereunder, including discharge, disciplinary action over the interpretation and application of the Agreement shall be disposed of in the following manner: . . . ."

Sub-sections a, b, c, and d set forth the procedure for handling grievances and for arbitration in the event of failure of the grievance procedures. Section 8 provided procedures for company grievances. The contract did not contain a no-strike clause.

In the period between August and December of 1963 differences arose between the company and the union over whether the bus operators — members of the union — were required to carry standing passengers. Finally, on December 29, 1963, one of the operators, Paine, refused to obey a company order to carry standees. The company thereupon removed him from service and on December 31, 1963, suspended him for thirty days for insubordination. The union filed a grievance protesting the suspension on January 7, 1964, but it was denied by the company on its merits. In protest against Paine's suspension, all the other union drivers refused to pull their runs. After warnings that it considered the strike illegal and that all participating employees were subject to discharge, and after demands

that the union follow the grievance procedure of the contract, the company discharged approximately 190 operators and terminal employees for participating in the strike. Most of the discharges were confirmed by letter on January 6, 1964, although some of the employees were discharged on January 8. On January 14 the company notified the union that it was rescinding the contract as of December 31, 1963 because of the strike. It also refused to process grievances filed on January 14 in behalf of the discharged employees. The union then brought this action pursuant to section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, to compel arbitration.

During these same months the company and the union were preparing to open negotiations over a new collective bargaining agreement. On November 21, 1963, the union gave the company notice of its desire to make certain changes in working conditions and pay practices in the contract which was to expire February 4, 1964, and of its desire to resolve all grievances. The company responded on November 27 by giving the union notice of its desire to cancel the agreement in its entirety and of its hope to prepare a new proposed agreement. It also suggested that any outstanding grievances be settled in accordance with Article XV, Section 2, of the collective bargaining agreement, which provided that "all unsettled claims will be paid, denied or dropped before expiration date of present contract."

On December 10 the union sent a letter to the company's vice-president Powell, alluding to the difference of opinion over the carrying of standees. This letter was put aside to be discussed at a January meeting set to resolve all grievances and to allow the union to present its changes in the contract. It seems to be agreed by the parties that these circumstances brought into play the provisions of section 8(d) of the National Labor Relations Act, 29 U.S.C.

§ 158(d).[1] The union was thus obligated to continue the terms and conditions of the existing contract in full force and effect, without resorting to strike or lockout during a sixty-day period commencing November 21, 1963. The discharges sought by the union to be arbitrated arose from a strike engaged in during that period.

The company's first major contention is that it was justified in rescinding the collective bargaining agreement and

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[1] "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

". . . Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

is no longer under any duty to arbitrate because the strike over Paine's suspension was a material breach of the agreement, in that the strike violated the provision for arbitration, which, it contends, was an implied no-strike clause. This contention must fail in the light of *Packinghouse Workers* v. *Needham,* 376 U.S. 247 (1964). In that case the Supreme Court compelled arbitration where the union struck in violation of an express no-strike clause. There, too, the company announced that it considered the collective bargaining agreement "repudiated and terminated" and that it would not have further dealings with the union. The company here has produced evidence to show that the parties considered the arbitration provision to be an implied no-strike clause and that it truly was the "quid pro quo" of the arbitration agreement. We do not see how that can alter the result in view of the Supreme Court's clear rejection of the same argument in *Needham,* 376 U.S. at 251. Here, as in *Needham,* no exception was made in the arbitration provision for the arbitrability of discharges arising out of strikes. In addition to that the contract here lacked the no-strike clause contained in the *Needham* agreement. See also *Drake Bakeries* v. *Bakery Workers,* 370 U.S. 254 (1962).

The company further contends that the strike in protest of Paine's suspension was a violation of section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), that the strikers thereby lost their status as employees, and that there is, therefore, no duty to arbitrate their discharge. In support of this contention the company attempts to tie in the differences over the carrying of standees with the proposed negotiations for a new agreement. It then argues that the strike protesting Paine's suspension was a strike to terminate or modify the existing contract, violative of section 8(d). See *Mastro Plastics Corp.* v. *Labor Board,* 350 U.S. 270 (1956). It is by no means clear from the affidavits presented by the parties that the question of standees was so related to negotiations for a new contract.

In view of our resolution of the issue, however, that matter is of no importance.

The question whether a given set of facts constitutes an unfair labor practice under section 8 is in the first instance for the National Labor Relations Board to decide. *San Diego Unions* v. *Garmon*, 359 U.S. 236 (1959). We, therefore, decline to decide whether the strike here was an unfair labor practice, in violation of section 8(d). We do admit, however, that it arguably was in violation of 8(d). On the other hand, we recognize that not every strike during the 8(d) sixty-day period is prohibited by that section. *Mastro Plastics* v. *Labor Board, supra* (unfair labor practice strike held permissible). See also *Local Union No. 9735, Etc.* v. *National Labor Rel. Bd.*, 258 F.2d 146 (D.C. Cir. 1958). The question, therefore, poses itself: Does a strike arguably in violation of section 8(d) of the National Labor Relations Act relieve the employer of his duty to arbitrate discharges resulting from the strike?

This is a question which goes, in the first instance, to arbitrability, since we have some doubt—though we need not decide—whether discharges occasioned by a violation of section 8(d) and, therefore, cloaked in the protection afforded by that section must be arbitrated. The question thus may be answered by the court. See *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964). Cf. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960). It has not been raised before. The Supreme Court, however, has made clear its preference for compelling parties to go to arbitration when they have agreed to do so. See, e.g., *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960). We do not believe it would be in keeping with the preferred position attached by the Court to labor arbitration were we to allow an employer to escape its duty to arbitrate whenever it can work out a theory that a particular strike may have been an unfair labor practice. We, therefore, hold that an employer must arbitrate grievances arising from the discharge of strikers even where the strike may

have been an unfair labor practice in violation of section 8(d). We decline to decide whether the same result would obtain where a strike was admittedly or clearly a violation of 8(d).

The company's contention that the union failed to file the grievances relating to discharge of the employees within the requisite time limits, is without merit. It can raise that defense before the arbitrator but not before this court. *John Wiley & Sons* v. *Livingston, supra.*

Nor are we impressed with the company's argument that the district court could not correctly have based its decision, *inter alia,* on an affidavit not given on personal knowledge. To the extent that the affidavit went beyond business records presented with it, it is not relied on by us in affirming the trial court. We do not understand the company as arguing that the business records themselves were inadmissible.

It follows that the sole question for the trial court to decide was whether the parties agreed to arbitrate discharges and disciplinary action. By the express words of their agreement they did, and the district court, therefore, was correct in ordering the company to arbitrate.

Judgment will be entered affirming the judgment of the district court.

ALDRICH, *Chief Judge,* (concurring). I quite agree with the court's opinion, but with the understanding, of which I wish to make note, that we are not presently deciding whether, if the strike was an unfair labor practice, it would be contrary to the provisions of the Act to foreclose by contract an employer's right to take the action contemplated by section 8(d)(4). *Cf. Penello* v. *International Union, U.M.W.,* D.C.D.C., 1950, 88 F. Supp. 935, 941; see *Local 453, International Union of Elec. Workers* v. *Otis Elevator Co.,* 2 Cir., 1963, 314 F.2d 25, *cert. den.* 373 U.S. 949. I note, also, that a determination by the arbitrator, as a prelude to granting relief under the contract, that the strike was not an unlawful labor practice would not be final. See *Carey* v. *Westinghouse Corp.,* 1964, 375 U.S. 261, 272.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6342.

TRAILWAYS OF NEW ENGLAND, INC., *Defendant, Appellant,*

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO DIVISION 1318, *Plaintiff, Appellee.*

Judgment

April 13, 1965

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

Approved,

Aldrich, *Ch. J.*

By the Court:

ROGER A. STINCHFIELD
Clerk.

No. 410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

TRAILWAYS OF NEW ENGLAND, INC., *Petitioner*,

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO, DIVISION 1318

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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September 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 410

TRAILWAYS OF NEW ENGLAND, INC., *Petitioner,*

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO, DIVISION 1318

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

The Union and the Company are parties to a collective bargaining agreement providing for the submission to final and binding arbitration of all unsettled grievances arising thereunder, including those relating to the discipline and discharge of employees. The

question presented is whether the Company can escape its contractual duty to arbitrate discharges resulting from a strike on the ground that the strike was a material breach and repudiation of the agreement and an arguable violation of Section 8(d) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth at pp. 3-5 of the petition.

STATEMENT

In the period between August and December 1963, differences arose between the Company and the Union as to whether their agreement, due to expire on February 4, 1964, should be interpreted and applied to require bus operators represented by the Union to carry "standees" in the various states served by the Company. (Pet. 2a, U.A. 22-23, R. 8, 18)[1] Letters were sent by the Union to the State regulatory commissions requesting information as to each State's rules and regulations regarding "standees" and inquiring as to the Company's compliance with these legal requirements (R. 18, 35). In this same period, on November 21 and 27, 1963, respectively, the Union and the Company were preparing to open negotiations for a new agreement by serving upon each other the notices required by section 8 (d) of the National Labor Relations Act (Pet. 3a). The parties planned to meet in January 1964 to resolve any outstanding grievances and to exchange their contract proposals (R. 79, 80).

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[1] "Pet.", "U.A." and "R." refer, respectively, to the Petition, Union's Appendix printed at the back of its brief to the court of appeals and Company's Appendix.

On December 10 and 11, 1963, the Union transmitted to all operators and to the Company the results of the Union's survey of State laws on the subject of standees (Pet. 3a, U.A. 22-23, R. 18). The Union's letter to the Company stated that any differences of opinion between operators and supervisors as to whether standees should be carried could now be brought out in the open and resolved in a proper manner. The Company's only response to this letter was to set it aside for discussion at the parties' January meeting (Pet. 3a, R. 75).

On December 29, 1963, operator Paine, a Union member, was removed from service for failing to comply with a Company order to carry standees in Connecticut while lacking the special permit required by the law of that State for the transportation of standing passengers (Pet. 2a).[2] Paine was given a 30-day suspension for this alleged "insubordination" on December 31, 1963 (R. 9, 24, 32).

In protest of the disciplinary action taken by the Company, each of the union drivers in turn refused to pull his trip (Pet. 2a, R. 32). The Company accused the Union of refusing to follow the grievance procedure and issued warnings that the Company considered any refusal to work a violation of the contract and cause for discharge. Virtually the entire work force of the Company numbering approximately 190 operators and terminal employees was ultimately discharged for alleged participation in an unlawful strike. The employees received written notice of their discharge by letters

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[2] The reply of the Connecticut Public Utility Commission to the Union's inquiry had stated that the Company was not licensed to carry standees in Connecticut (R. 35).

dated January 6 and 8, 1964, respectively (Pet. 3a, R. 28, 30-31).

Meanwhile, however, the Company filed a grievance under the contract for damages resulting from the strike, dated January 6, 1964, which it later abandoned (U.A. 25, R. 39-40). On January 7, 1964, the Union filed a grievance protesting Paine's suspension (Pet. 2a, R. 19). The Company denied this grievance on its merits by letters dated January 14 and 27 (Pet. 2a, R. 20, 21).[3] The instant grievance protesting the employees' discharge was filed on January 14, 1964 (Pet. 3a, R. 22). On the same date, the Company purported to terminate the contract retroactive to December 31, 1963 as a result of the strike and thereafter refused to process the grievance of the discharged employees (R. 23, 11, 25). The Union then brought this suit to compel arbitration.

The decision of the district court (R. 55-59) held that the Company could not be released from its contractual duty to arbitrate on the ground that the strike allegedly constituted an unfair labor practice and a major breach of the agreement, relying upon this Court's decisions in *Packinghouse Workers* v. *Needham*, 376 U.S. 247, *Drake Bakeries Inc.* v. *Bakery Workers*, 370 U.S. 254 and *Smith* v. *Evening News Assn.*, 371 U.S. 195.

The court of appeals unanimously affirmed the district court's decision, concluding that in view of this Court's rejection of the same argument in *Needham*, 376 U.S. at 251, the Company could not successfully justify its refusal to arbitrate on the ground that

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[3] Petitioner has chosen not to challenge the judgments below insofar as they order the Company to arbitrate the Paine grievance (Pet. 7, n. 3, 7a, R. 60).

the strike was a material breach and repudiation of the agreement. The court further stated that it would not be in keeping with (Pet. 6a)

> the preferred position attached by the [Supreme] Court to labor arbitration were we to allow an employer to escape its duty to arbitrate whenever it can work out a theory that a particular strike may have been an unfair labor practice. We, therefore, hold that an employer must arbitrate grievances arising from the discharge of strikers even where the strike may have been an unfair labor practice in violation of section 8(d). We decline to decide whether the same result would obtain where a strike was admittedly or clearly a violation of 8(d).

Chief Judge Aldrich, concurring, noted that the court was expressing no opinion on the question whether, if a strike was an unfair labor practice, it would be contrary to the provisions of the Act, to foreclose by contract an employer's right to take the discharge action contemplated by Section 8(d)(4).

ARGUMENT

No issue warranting review by this Court is presented. This case raises no question of general importance. The decision below is so plainly correct and in accord with principles of law enunciated by this Court and with the decisions of other courts that there is no reason for granting the petition.

I. This Case Has No General Importance

The first question stated in the Petition, whether a strike in violation of Section 8(d) of the Labor Management Relations Act prevents the Union from arbitrating discharges resulting from the strike, is not

involved in this case, and was not decided, or required to be decided, by the court below. The record and decision below will be searched in vain for any finding that the strike was, in fact, within the prohibition of Section 8(d). Indeed, the Petition itself concedes that the court below, in declining to determine in the first instance whether the facts of this case presented more than an arguable violation of Section 8(d), "failed to meet the issue directly" (Pet. 9). Hence, Petitioner's theory that a novel and substantial issue of statutory construction is presented by the decision below, is entirely predicated upon an unsupported premise. Whatever may be the significance of the Section 8(d) issue to the federal labor policy, it is not properly before the Court upon this Petition.[4]

Moreover, the second issue stated by the Petition, that the decision below conflicts with this Court's decisions in *Drake Bakeries, Inc.* v. *Bakery Workers,* 370 U.S. 254 and *Packinghouse Workers* v. *Needham,* 376 U.S. 247 reduces to a purely factual claim that the particular circumstances of this case show either a repudiation of the agreement to arbitrate, or a fundamental and long-lasting change in the parties' relationship, sufficient to distinguish those decisions (See discussion, *infra,* pp. 12-13). Accordingly, this aspect of the Petition likewise presents no issue of general importance warranting review.

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[4] Assuming that such a question "abstractly considered, • • • may present an intellectually interesting and solid problem • • • this Court does not sit to satisfy a scholarly interest in such issues. *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74.

II. The Decision Below Is Obviously Correct

The only remaining thrust of the Petition is that this case was wrongly decided below and should be reversed for the benefit of Petitioner. It completely answers such assertions simply to state that even if this particular decision were in error, "this Court does not sit for the benefit of particular litigants." *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74. Whenever, as in this case, "review would be of no importance save to the litigants themselves", the writ of certiorari should not be granted. *Rudolph* v. *United States,* 370 U.S. 269, 270.

In addition, however, the holding below that a claim within the scope and coverage of an arbitration agreement is no less arbitrable because it arises out of conduct which may be both violative of the contract and prohibited by the National Labor Relations Act, is fully consistent with principles which this Court has repeatedly employed to determine the arbitrability of disputes.

1. The recent cases of this Court leave no doubt that the ultimate question of arbitrability to be decided by the courts under Section 301 in no way depends in its resolution upon whether the subject matter of the grievance involves conduct forbidden by that statute. The matters in dispute are referrable to arbitration under the contract even though the underlying activity is arguably protected or prohibited by the Act. *Smith* v. *Evening News Assn.,* 371 U.S. 195, 197; *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95, 101 n. 9; *Atkinson* v. *Sinclair Refining Co.,* 370 U.S. 237, 246 n. 5; *Dowd Box Co.* v. *Courtney,* 368 U.S. 502; *Humphrey* v. *Moore,* 375 U.S. 335, 84 S. Ct at p. 369; cf. *Carey*

v. *Westinghouse Electric Corp.*, 375 U.S. 261, 84 S. Ct. 401, 407.

Manifestly, petitioner's argument that the court below should have declared the contractual right to arbitrate nullified by Section 8(d) violations misconceives the authority of the courts in determining questions of arbitrability. Their duty is to enforce the parties' agreement even though the conduct involved may also be an unfair labor practice. The authority to deal with an unfair labor practice which may also be a contract violation lies with the Labor Board. *Smith* v. *Evening News Assn., supra,* 371 U.S. at 197. Hence, the Court below was clearly right to refrain in the first instance from interpreting Section 8(d) or deciding the application of that section to the facts of this case. Just as the Labor Board is "so severely * * * limited to the adjudication of statutory rights that it has no power to adjudicate contractual disputes," so the courts and arbitrators in enforcing the private contractual undertakings of the parties have no primary jurisdiction to determine the statutory rights and duties of the parties under the provisions of the Act. See, *Steelworkers* v. *American Int'l Aluminum Corp.*, 334 F. 2d. 147, 152 (C.A. 5), cert. den. 379 U.S. 991.

Another error in petitioner's argument lies in its failure to recognize that not every strike which occurs during the 60-day period prior to expiration of a collective bargaining agreement is prohibited by Section 8(d). Thus, the Court below, although correctly deciding that it need not resolve the Section 8(d) issue, properly pointed out that the provisions of Section 8(d) have never been interpreted to proscribe all strikes by a party seeking termination or modification

of a pre-existing agreement. *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 286; *Local Union 9735* v. *N.L.R.B.*, 258 F. 2d 146 (C.A.D.C.) *Mile Branch Coal Co.* v. *U.M.W.*, 286 F. 2d 822 (C.A.D.C.), cert. den. 365 U.S. 871. Petitioner's assertion (Pet. 12) that on this point the decision below conflicts with decisions of the Eighth and District of Columbia Circuits, does not find support in the cases cited. The cases relied upon merely recite the language of the statute and hold that where a strike prior to expiration of the statutory notice period, does in fact seek to obtain a new contract or modifications in the existing agreement, rather to enforce the agreement as written, a violation of Section 8(d) is committed which causes the strikers to lose the protections of Section 8, 9 and 10 of the Act.

Section 8(d) causes employees who participate in a strike during the sixty-day notice period to forfeit their status only when recourse to strike action is for the purpose of effecting changes in existing contract terms. The statutory scheme is based on the theory that a sixty-day period of uninterrupted negotation, with the help when necessary of Federal and State conciliators, will produce agreement without the need for recourse to industrial strife. Resort to a strike or lockout to compel one party to accede to the contract demands of the other is enjoined before the expiration of the sixty days allotted to effect agreement without self help. "Section 8(d) thus seeks during this natural renegotiation period, to relieve the parties from the economic pressure of a strike or lockout *in relation to the subjects of negotiation*" [emphasis added] *Mastro Plastics Corp.* v. *N.L.R.B.*, *supra*, 350 U.S. at 286. This Section does not apply unless the object of the strike is "to

modify the terms of the agreement." *Local Union 9735* v. *N.L.R.B., supra,* 258 F. 2d at 149.[5]

In any event, nothing in the language or logic of Section 8(d) supports the further essential assumption of petitioner's argument that the effect of a violation must be not only to divest strikers of their statutory protections but also to destroy their private contractual right to have their grievances arbitrated. Because the issues and problems presented "are not at all alike," an employer may be entirely free under Section 8(d) to discharge employees who engage in a work stoppage to obtain modification of a contract during the 60-day period to its expiration without in the least foreclosing the Union from enforcing in an arbitration proceeding the private "*contractual* right of employees not to be discharged 'unjustly'." See, *Steelworkers* v. *American Int'l Aluminum Corp., supra,* 334 F. 2d 147, 152; *Fibreboard Paper Products* v. *Machinists,* 344 F. 2d 300, 305 (C.A. 9). If, upon arbitration, the discharge penalty proves too severe or discriminatory in its application, such employees may be ordered reinstated. See, e.g. *Borden Chemical Co.,* 34 LA 325 (Wallen); *Glass Container Manufacturers Institute,* 27 LA 131 (Lehoczky); *Lone Star Steel Co.,* 30 LA 519 (Kelli-

[5] Although properly irrelevant to the issues here, the court below aptly observed that it is "by no means clear" that the question of standees was so related to negotiations for a new contract that the strike protesting the suspension of Operator Paine must be considered a strike to terminate or modify the existing contract, prohibited by Section 8(d) (Pet. 5a). The violation of this Section is no more than "arguable" because it appears from the only evidence submitted that the Union was protesting the employer's refusal to comply with his existing contractual commitments and with the applicable provisions of State law concerning the transportation of standees rather than seeking changes in the contract terms. (See, pp. 2-3, *supra*).

her); *Yardley Plastics Co.*, 36 LA 280 (McIntosh); *Hooker Chemical Corp.* 36 LA 857 (Kates).

2. This Court has plainly ruled that it is no defense to the arbitrability of a claim of wrongful dismissal under an agreement to arbitrate discharges and disciplinary action that the discharge is based upon conduct constituting a major breach of the agreement. *Packinghouse Workers* v. *Needham*, 376 U.S. 247; *Drake Bakeries Inc.* v. *Bakery Workers*, 370 U.S. 254.[6] In disposing of this phase of the case, the court below was unquestionably justified in placing its principal reliance upon this Court's decision in *Needham*. That case held, in a very similar factual context, that even a strike in violation of an express no-strike clause did not relieve the employer of a contractual obligation to arbitrate discharges arising from the strike. Not only did the contract here lack the no-strike clause contained in the *Needham* agreement, but neither contract made any exception in the arbitration provision for the arbitrability of discharges arising out of strikes. Accordingly, here, as in *Needham* and *Drake*, "by agreeing to arbitrate all claims without excluding the case where the Union struck over an arbitrable matter, the parties * * * negatived any intention to condition the duty to arbitrate upon the absence of strikes."

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[6] *Accord, Steelworkers* v. *American Int'l Aluminum Corp.*, 334 F. 2d 147 (C.A. 5), cert. den., 379 U.S. 991; *I.U.E.* v. *General Electric Co.*, 332 F. 2d 485 (C.A. 2), cert. den., 379 U.S. 928; *United Textile Workers* v. *Newberry Mills, Inc.*, 315 F. 2d 217 (C.A. 4), cert. den., 375 U.S. 818; *Local 748, I.U.E.* v. *Jefferson City Cabinet Co.*, 314 F. 2d 192 (C.A. 6), cert. den., 377 U.S. 904; *Locomotive Firemen* v. *Kennecott Copper Corp.*, 338 F. 2d 224 (C.A. 10); *Minnesota Joint Board* v. *United Garment Mfg. Co.*, 338 F. 2d 195 (C.A. 8); *E. T. Simonds* v. *Hod Carriers*, 315 F. 2d 291 (C.A. 7).

Drake Bakeries Inc. v. *Bakery Workers*, *supra*, 370 U.S. at 262.

3. Petitioner's contention that the facts of this case demonstrate such a breach or repudiation of the grievance and arbitration provisions of the agreement as to bring the decision below into conflict with the qualifying language set forth by this Court in *Drake* and *Needham* turns essentially upon an appraisal of the evidence in the particular case and is, for that reason alone, without merit.[7]

Moreover, the repudiation argument here is far less persuasive than that advanced in *Needham* and *Drake* where the agreements did at least contain express no-strike provisions as well as other clauses, absent here, which indicated that the grievance and arbitration procedures were intended to be the exclusive means of settling any grievances arising under the contracts. In the absence of any showing that the employees so understood this contract, it could scarcely be said that the Union in this case, by striking over arbitrable matters, deliberately and knowingly repudiated a duty to arbitrate. In addition the instant strike protested the refusal of the Company to comply with its own contractual commitments. Seeking enforcement of the contract in these circumstances cannot reasonably be deemed a repudiation of the contract itself, or of any promise to arbitrate. Furthermore, the union in *Need-*

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[7] "[A] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. "We do not grant a certiorari to review evidence and discuss specific facts." *U. S.* v. *Johnston*, 268 U.S. 220, 227.

ham waited a much longer time to invoke the grievance procedure, and the company there flatly refused to process the grievances. Here, the Company's filing of its own grievance for damages under the contract and its continued processing of the Union's grievance filed on behalf of the employee whose suspension originally precipitated the walkout convincingly demonstrate that the Company here, unlike *Needham*, did not truly regard the Union as having "repudiated and terminated the labor agreement."

Petitioner's claim that the record shows a fundamental change in the relationship of the parties prior to the arbitration demand, as premised in *Needham* (Pet. 17) has nothing to support it other than the contentions already answered (supra, pp. 7-10) that the participants in the strike lost their status as employees of the Company by operation of Section 8(d).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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